

HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMERICAN MANAGEMENT SERVICES
EAST, LLC, a Washington limited liability
company, AMERICAN MANAGEMENT
SERVICES LLC, a Washington limited liability
company, AMERICAN MANAGEMENT
SERVICES CALIFORNIA INC., a Washington
corporation, GOODMAN REAL ESTATE, INC.,
a Washington corporation, formerly d/b/a
GOODMAN FINANCIAL SERVICES, INC.,
STANLEY HARRELSON, an individual, JOHN
GOODMAN, an individual, PINNACLE IRWIN
LLC, a Washington limited liability company,
PINNACLE MONTEREY LLC, a Washington
limited liability company,,

Plaintiffs,

v.

SCOTTSDALE INSURANCE COMPANY, a
Delaware corporation, and LEXINGTON
INSURANCE COMPANY, a Delaware
corporation,

Defendants.

NO. C15-cv-01004

DEFENDANT SCOTTSDALE INSURANCE
COMPANY'S REPLY IN FURTHER
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT

NOTE ON MOTION CALENDAR:
DECEMBER 18, 2015

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Scottsdale is entitled to judgment as a matter of law because AMS's response fails to show that the underlying litigation raised claims that were potentially covered under Scottsdale's policies. Rather than set out specific facts showing that the underlying plaintiffs alleged an

1 accidental occurrence that caused property damage or bodily injury, AMS sets out only
 2 speculation about facts that hypothetically could have been alleged and evidence that
 3 theoretically could have been introduced. To establish a duty to defend, AMS bears the burden
 4 of showing that “the facts alleged in the complaint against [AMS], if proven, would trigger
 5 coverage under the policy.” *United Servs. Auto. Ass’n v. Speed*, 179 Wn. App. 184, 196, 317
 6 P.3d 532 *review denied*, 180 Wn.2d 1015, 327 P.3d 55 (2014) (citing *Am. Best Food, Inc. v. Alea*
 7 *London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010)).

8 This standard is not met through speculation about facts that *could* be alleged. *See*
 9 *Grange Ins. Ass’n v. Roberts*, 179 Wn. App. 739, 754–55, 320 P.3d 77 (2013) *review denied*, 180
 10 Wn.2d 1026, 328 P.3d 903 (2014). In discussing a similar standard, the Ninth Circuit has
 11 explained that speculation about un-pleaded allegations fails to meet an insured’s burden:

12 The plaintiffs in the underlying suit do not allege the type of
 13 damages covered by the policy. To support a finding of potential
 14 liability, the plaintiffs would need to allege *new facts* of bodily
 15 injury. Mere speculation that the plaintiffs could or will allege
 16 such facts does not give rise to a duty to defend. The possibility of
 17 an amendment does not require the insurer to speculate about any
 18 conceivable claim that a plaintiff might bring against the insured or
 19 to spin out wild theories of recovery for every conceivable
 20 damage. Liability under the policies can only be characterized as
 21 speculative and hypothetical. The duty to defend, albeit a broad
 22 one, encompassing liability for damages *potentially* covered under
 23 the policies, does not stretch this far.

24 *The Upper Deck Co., LLC v. Fed. Ins. Co.*, 358 F.3d 608, 615–16 (9th Cir. 2004). AMS’s broad
 25 speculation about possible allegations that were never actually raised fails to carry AMS’s
 26 burden and entitles Scottsdale to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S.
 317, 323–24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

23 II. ANALYSIS

24 A. AMS stretches the notion of “conceivable” coverage to unprecedented lengths.

25 While AMS couches its arguments in platitudes about the insurer’s broad duty to defend
 26 under Washington law, what it implicitly requests is that this Court drastically expand

1 Washington law. This overreaching is exposed when AMS argues that, even though the
2 underlying complaints did not allege bodily injury or property damage, Scottsdale had a duty to
3 defend because it was conceivable that evidence of property damage or bodily injury *could have*
4 *been introduced* at some point during the underlying litigation. *See* Case No. C15-01004, Dkt.
5 No. 74 at 12 (arguing that a duty to defend arose because the underlying allegations “were
6 sufficient to allow introduction of evidence of actual bodily injury and/or property damage”); *id.*
7 at 14 (“evidence of bodily injury to military families could have been introduced”).

8 Nothing in Washington law supports AMS’s notion that the duty to defend arises merely
9 because the complaint alleges facts which could allow the introduction of evidence on which a
10 covered claim could theoretically be based. Rather, the insurer must defend if the complaint
11 “alleges facts which could, if proven, impose liability upon the insured within the policy’s
12 coverage.” *Roberts*, 179 Wn. App. at 751 (quoting *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147
13 Wn.2d 751, 760, 58 P.3d 276 (2002)). The duty to defend must be based on a “reasonable
14 interpretation of the facts or the law.” *Edmonson v. Popchoi*, 172 Wn.2d 272, 282, 256 P.3d
15 1223 (2011) (quoting *Am. Best Food*, 168 Wn.2d at 405).

16 Applying these standards, Washington courts have rejected the notion that speculation
17 about un-pleaded facts can impose a duty to defend. *Roberts*, for example, denied a duty to
18 defend against a claim of outrage because the complaint alleged only intentional conduct. The
19 court reached this result even while acknowledging that evidence of reckless conduct could have
20 been introduced and that it was “conceivable” that the insured’s conduct resulted in unintended
21 injuries. *Roberts*, 179 Wn. App. at 753, 756.

22 AMS attempts to dramatically overhaul these standards by pointing to the Washington
23 Supreme Court’s use of the word “conceivably” in *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d
24 793, 805, 329 P.3d 59 (2014). But *Expedia* did not rewrite the case law. *Expedia* essentially
25 involved underpayment of taxes. Simply put, one can underpay taxes either intentionally or
26 negligently. And if the complaint fails to specify one or the other, then the insurer has a duty to

1 defend under a policy covering damages caused by negligence. *See id.* That is all *Expedia* said.
2 There is no indication in *Expedia* that the Washington Supreme Court intended to make insurers
3 responsible for facts that *could* have been pleaded or for evidence that *could* be introduced.

4 AMS's proposed test would require the insurer to defend in every case, because it is
5 always hypothetically possible that a complaint will be amended to add a covered claim or
6 evidence will be introduced that would implicate coverage. AMS's interpretation thus conflicts
7 with Washington law, which recognizes that a defense can be denied where the complaint does
8 not allege covered damages. *See, e.g., Roberts*, 179 Wn. App. at 755.

9 **B. Scottsdale did not base its denial on extrinsic evidence.**

10 AMS is mistaken when it argues that Scottsdale used extrinsic evidence to deny AMS's
11 requested defense. The reasons for the denial of defense are set forth in detail in Scottsdale's
12 correspondence to AMS and its counsel. *See generally* C15-1004, Dkt. Nos. 52-1–52-4 p. 36.

13 Scottsdale discussed extrinsic evidence in its prior briefing for two reasons. First and
14 foremost, Scottsdale has addressed the extrinsic evidence that was proffered by AMS. For
15 example, AMS cited several declarations from the underlying litigation that supposedly showed
16 "instances" of property damage. Scottsdale analyzed these declarations and determined that
17 they: (a) do not identify any instances of property damage; and (b) confirm that the wrongdoing
18 at issue in the underlying litigation involved fraud and other intentional misconduct, which is not
19 covered under the Scottsdale policies. *See, e.g.,* C15-1004, Dkt. No. 53 at 9–11. AMS's tactic—
20 of raising extrinsic evidence and then, when Scottsdale addresses that evidence, accusing
21 Scottsdale of denying a defense based on extrinsic evidence—is disingenuous.

22 Second, Scottsdale has mentioned certain findings in the underlying litigation that are
23 relevant to public policy. For example, AMS was found in the Fort Benning action to have
24 committed intentional misconduct as a matter of law, and it admitted the basis for the related
25 claims in the MBMH action. *See American Management Services East, LLC v. Fort Benning*
26 *Family Communities, LLC*, 333 Ga. App. 664, 774 S.E. 2d 233 (2015); C15-01004, Dkt. No. 54

1 at 13. It would violate Washington's public policy if an insured could shift intentionally inflicted
 2 injuries to an insurer. *Detweiler v. J.C. Penney Casualty Ins. Co.*, 110 Wn.2d 99, 105-06, 751
 3 P.2d 282 (1988). Although Scottsdale could not (and did not) deny a defense based on this
 4 extrinsic evidence, the fact that imposing a duty to defend here would violate public policy is
 5 relevant to this Court's analysis.¹

6 **C. The underlying complaints do not allege damages "because of,"**
 7 **"caused by," or "for" property damage or bodily injury.**

8 Conspicuously absent from AMS's two rounds of briefing is a single citation to any one
 9 line, in any of the hundreds of pages that comprise the various iterations of the complaints in two
 10 separate underlying actions, that identifies a single instance of property damage or bodily injury.
 11 The best AMS can do is point to the allegation that AMS's work-order fraud created "life and
 12 safety concerns." C15-1004, Dkt. No. 74 at 5. Implicitly conceding that "concerns" are not
 13 injuries, AMS then conclusorily argues that the underlying plaintiffs used this term as "shorthand
 14 for actual bodily injury and property damage." *Id.* at 11.

15 As Scottsdale has explained previously, however, the extrinsic declarations about AMS's
 16 work-order fraud, proffered by AMS, do not allege any instances of bodily injury or property
 17 damage. Instead, they merely confirm what the underlying plaintiffs said in their complaints,
 18 that AMS employees were concerned that the practice of deliberately falsifying work orders
 19 could pose *risks* to resident safety. *See* C15-1004, Dkt. No. 71 at 10-11.

20 The only declaration cited by AMS that mentions specific instances of property damage
 21 or bodily injury was Paul Cramer's. But Mr. Cramer specifically testified that he was *not*
 22 suggesting that those instances were caused by AMS's work-order fraud or any other wrongful
 23 practice of AMS. C15-1004, Dkt. No. 52-7 at 8. AMS also cites the *Charbonneau* and
 24 *Mosquera* cases, but fails to present any evidence whatsoever that these separate lawsuits were in
 25 any way the basis for any damages claim raised by the underlying Plaintiffs.

26 ¹ Accordingly, the Court should deny AMS's footnote motion to strike. *See* C15-01004, Dkt. No. 74 at 9.

1 Finally, AMS contends that a “risk of harm” can be considered property damage or
 2 bodily injury, attempting to distinguish *Wellbrock v. Assurance Co. of Am.*, 90 Wn. App. 234,
 3 242-43, 951 P.2d 367 (1998). According to AMS, *Wellbrock* is distinguishable because the issue
 4 there was whether the injury had occurred during the policy period. But AMS glosses over the
 5 fact that *Wellbrock* rejected the duty to defend because “the risk of later harm” was not an injury.
 6 C15-1004, Dkt. No. 74 at 16. AMS’s arguments here cannot be reconciled with *Wellbrock*’s
 7 unambiguous holding that the “mere presence of a ‘hazard’ . . . does not trigger coverage.”
 8 *Wellbrock*, 90 Wn. App. at 242–43.

9 AMS’s position also cannot be reconciled with another case cited in AMS’s brief, *Yakima*
 10 *Cement Products Co. v. Great Am. Ins. Co.*, 93 Wn.2d 210, 219, 608 P.2d 254 (1980). There,
 11 the insured negligently installed defective concrete panels in a building. *Id.* at 211–12. The
 12 general contractor claimed damages caused by the delay while the insured removed and replaced
 13 the panels. *Id.* at 212. These damages included damage to the building’s other structural
 14 materials as a result of exposure to the elements during the delay. *Id.* at 213.

15 The Washington Supreme Court rejected, however, the notion that these consequential
 16 damages could trigger coverage, because the general contractor never claimed that the wrongful
 17 act of incorporating defective materials into the building caused any actual property damage. *Id.*
 18 at 218. The court explained that there could have been coverage if the general contractor had
 19 alleged, for example, that the integration of the defective panels had diminished the building’s
 20 value. *Id.* Had such an allegation been raised, the consequential damages actually claimed could
 21 have been covered. *Id.* But absent such an allegation, the consequential damages were not
 22 covered because they did not “result directly from injury to or destruction of tangible property.”
 23 *Id.* at 219 (citing *Labberton v. General Cas. Co.*, 53 Wn.2d 180, 332 P.2d 250 (1958)).

24 Likewise, here, the absence of any allegation of actual property damage or bodily injury
 25 caused by AMS’s work-order fraud is fatal to its claims. Nowhere did the underlying plaintiffs
 26 allege, for example, that the “concerns” raised by work-order fraud diminished the value of their

1 property. *Yakima Cement, Wellbrock, and Roberts* clarify that insurance coverage and the duty
 2 to defend are not covered by mere allegations that a hazard was created or by allegations of
 3 uncovered harm from which one might speculate that covered allegations could have been raised.

4 This same analysis disposes of AMS's argument that it was entitled to a defense against
 5 claims of consequential damages. With one exception, every case cited by AMS on this point
 6 alleged either actual harm to or lost use of tangible property. *See Minnesota Min. & Mfg. Co. v.*
 7 *Travelers Indem. Co.*, 457 N.W.2d 175, 182 (Minn. 1990) (where insured stored hazardous waste
 8 in a manner that caused it to escape into the soil, insurance could cover "consequential damages
 9 flowing from the direct damage caused to the environment"); *Federated Mut. Ins. Co. v.*
 10 *Concrete Units, Inc.*, 363 N.W.2d 751, 756 (Minn. 1985) (loss of use of grain elevator); *Safeco*
 11 *Ins. Co. v. Munroe*, 165 Mont. 185, 191–92, 527 P.2d 64, 68 (1974) ("we find it to be beyond
 12 dispute that a Montana wheat field and the crop therein, is tangible property"); *Universal*
 13 *Underwriters Ins. Co. v. LKQ Smart Parts, Inc.*, 963 N.E.2d 930, 939 (Ill. App. 2011) (vehicle
 14 was "discarded and destroyed"); *Marley Orchard Corp. v. Travelers Indem. Co.*, 50 Wn. App.
 15 801, 806–07, 750 P.2d 1294 (1988) (deficient irrigation system caused stress to trees);
 16 *Dimambro-Northend Associates v. United Const., Inc.*, 154 Mich. App. 306, 309, 397 N.W.2d
 17 547 (1986) (fire caused damage to tunnel); *Aetna Cas. & Sur. Co. v. Gen. Time Corp.*, 704 F.2d
 18 80, 83 (2d Cir. 1983) (lost profits based on physical damage to zone valves allowed, but "there
 19 can be no recovery for intangible losses unless there has been actual physical damage to
 20 property"); *Gen. Ins. Co. of Am. v. Gauger*, 13 Wn. App. 928, 932, 538 P.2d 563 (1975) (bad
 21 seeds damaged farm land); *Westchester Fire Ins. Co. v. Bell Lumber & Pole Co.*, No. 1:86-CV-
 22 8948, 1991 WL 11255748, at *13 (N.D. Ill. Oct. 23, 1991) (lost use of rail cars); *Cent. Armature*
 23 *Works, Inc. v. Am. Motorists Ins. Co.*, 520 F. Supp. 283, 286 (D. D.C. 1980) (negligently
 24 performed work caused damage to electrical system). The one exception is *Yakima Cement*,
 25 which, as explained above, held that consequential damages cannot be covered unless they result
 26

1 directly from actual property damage or bodily injury. Because there are no such allegations in
2 the underlying litigation here, Scottsdale had no duty to defend.

3 **D. Fraud and intentional breach of fiduciary duty are not accidental**
4 **occurrences.**

5 AMS bears the burden of proving not only that the underlying litigation raised claims of
6 property damage or bodily injury, but also that such damages were allegedly caused by an
7 accidental occurrence. The only allegations that AMS has pointed to as raising property damage
8 or bodily injury are the claims that AMS's work-order fraud created life and safety risks.
9 Because one cannot accidentally commit fraud, AMS's claim fails as a matter of law. AMS
10 attempts to skirt this result by arguing that whether an event is an accident is a subjective
11 analysis, requiring proof of the insured's state of mind.

12 For this proposition, AMS relies on *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of*
13 *Omaha*, 126 Wn.2d 50, 59–60, 882 P.2d 703 (1994). Scottsdale explained in its opposition to
14 AMS's motion for partial summary judgment that *Queen City* has only minor relevance because
15 it construed a different definition of "occurrence." The policy at issue in *Queen City* defined
16 "occurrence" as an "accident" that "unexpectedly and unintentionally" caused damage. *Queen*
17 *City*, 126 Wn.2d at 59–60.² The court held that whether the damage was "unexpected" or
18 "unintentional" must be analyzed subjectively from the perspective of the insured. *Id.* at 67–68.

19 Here, in contrast, the policies define "occurrence" merely as an "accident," without the
20 "unexpectedly or unintentionally" language. Before and after *Queen City*, courts hold that
21 "accident" is an objective term. *See Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 403,
22 823 P.2d 499 (1992) ("accident" is not a subjective term. Thus, the perspective of the insured as

23 ² *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 164 P.3d 454 (2007), also cited by AMS, analyzed an insurance
24 policy with the same "occurrence" definition as was at issue in *Queen City*. These opinions have caused confusion.
25 For example, relying in part on dicta from *Cle Elum Bowl, Inc. v. North Pacific Ins. Co.*, 96 Wn. App. 698, 981 P.2d
26 872 (1999), a court interpreted *Queen City* as imposing a subjective "neither expected nor intended" qualification on
the definition of "occurrence." *Allstate Prop. & Cas. Ins. Co. v. Strand*, No. C11-1334JLR, 2012 WL 2004994, at
*6 (W.D. Wash. June 5, 2012). This reading of *Queen City* is demonstrably incorrect. *Queen City* was interpreting
a policy that included "unexpectedly and unintentionally" in its definition of "occurrence." It did not purport to
superimpose this language into policies that defined "occurrence" differently.

opposed to the tortfeasor is not a relevant inquiry.”) (quoting *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 685, 801 P.2d 207 (1990)); *Speed*, 179 Wn. App. at 198 (“Whether an event constitutes an accident is determined objectively and does not depend on the insured’s subjective perspective.”). *Queen City* did not change this rule. To the contrary, the court distinguished the term “accident” from “unexpectedly and unintentionally,” holding that “determination of what constitutes an accident, *i.e.*, whether injury or damage has resulted from an ‘accident,’ is not dispositive on the standard for expectation of the damages.” *Queen City*, 126 Wn.2d at 68.

The rule announced in *Queen City* was intended to ensure that liability policies would cover acts of negligence, “even though precipitated by intentional acts.” *See id.* at 69. The court explained that “the average purchaser of insurance would understand that the policy language provides for coverage for damage resulting from most acts of ordinary negligence.” *Id.* The essential facts were that the insured had intentionally stored hazardous waste on its property, but had done so negligently, allowing the waste to contaminate surrounding ground and groundwater. *Id.* at 58–59. Just as a person “who intentionally backs a car up, but does so negligently into the path of a vehicle having the right of way,” would expect insurance coverage to apply, so the ordinary consumer would expect the *Queen City* insured’s negligent conduct to be covered. The *Queen City* analysis is simply inapposite here, where the allegation is that AMS intentionally engaged in a fraudulent scheme.

As explained in Scottsdale’s opposition to AMS’s motion for partial summary judgment, when the insured intentionally commits wrongful conduct, an accident will be recognized only if “some additional, unexpected, independent, and unforeseen happening” produces the injury. *Butler*, 118 Wn.2d at 401 (quoting *Detweiler*, 110 Wn.2d at 104). The cases applying this rule have often described the facts as “bizarre.” *See Detweiler*, 110 Wn.2d at 102 (jury question as to whether an accident occurred, under “the somewhat bizarre facts,” where the insured fired a gun at the back of a pickup and the ricochet injured him, given variables such as the truck’s speed and the angle of fire); *Fischer v. State Farm Fire & Cas. Co.*, 272 F. App’x 608 (9th Cir. 2008)

1 (an accident occurred in the “bizarre set of circumstances” where the victim mistakenly believed
2 she was consenting to sex with her boyfriend and the accused rapist mistakenly believed she was
3 consenting to sex with him). Here in contrast, there is nothing bizarre about the allegation that
4 failing to fix life-safety equipment, and then lying about it, results in risks to life and safety.

5 Finally, there is no solace for AMS in its contention that a fiduciary duty can be breached
6 either negligently or intentionally. The complaints here alleged only intentional breaches of
7 fiduciary duty. *See* C15-1004, Dkt. Nos. 51-5 at 65–67; 51-10 at 45–46. With respect to the
8 work-order scheme, the underlying complaints describe AMS’s breach of fiduciary duty as
9 “committing wide-spread work order fraud.” *Id.* at 45.

10 The purpose of these allegations was to justify termination of the property management
11 agreements, which by their terms terminated automatically upon the occurrence of “theft, fraud,
12 or other knowing and intentional misconduct” by the AMS entities. C15-1004, Dkt. Nos. 51-5 at
13 9; 51-10 at 43–44. It is thus not surprising that the underlying plaintiffs based their fiduciary-
14 duty claims purely on fraud and other intentional misconduct. These allegations failed to raise
15 an accidental occurrence and thus were not covered under Scottsdale’s policies. *See Corp. of the*
16 *Catholic Archbishop of Seattle v. Arrowood Indem. Co.*, No. C15-175 MJP, 2015 WL 8212719,
17 at *2 (W.D. Wash. Dec. 8, 2015) (“If and when additional claims were asserted . . . and if and
18 when additional facts supporting potential negligence liability were put forward, the duty to
19 defend would be triggered,” but decision not to defend where complaint alleged only intentional
20 misconduct was reasonable).

21 **E. Various exclusions preclude coverage.**

22 Scottsdale has previously explained that various policy exclusions apply and would bar
23 coverage even if AMS could fabricate a covered occurrence. For example, to the extent AMS
24 bases its claim on vague references to mold in the extrinsic evidence, any such claim would be
25 barred under the mold exclusion. C15-1004, Dkt. No. 71 at 19. Notably, AMS has not disputed
26

1 that the mold exclusion bars coverage. It simply argues that there were other forms of damage.
2 C15-1004, Dkt. No. 74 at 28–29.

3 Finally, AMS fails to refute that the owned-property exclusion applies. Importantly,
4 AMS does not dispute that the underlying plaintiffs were named insureds under the Scottsdale
5 policies. Rather, it argues that the exclusion cannot bar coverage for AMS because it did not
6 own or lease the property at issue. C15-1004, Dkt. No. 74 at 27. The basis for this argument is
7 AMS’s claim that when a policy term refers to “the insured,” as opposed to “an insured,” the
8 term must be analyzed separately for each insured. *Id.*

9 AMS is simply wrong about the policy language. The owned-property exclusion applies
10 to “you,” which is defined as “the Named Insured . . . and *any* other person or organization
11 qualifying as a Named Insured under this policy.” C15-1004, Dkt. No. 50-6 at 21 (emphasis
12 added). Thus, the exclusion bars coverage for damage to property owned or leased by “any”
13 person who qualifies as a named insured. Because AMS concedes that the underlying plaintiffs
14 were named insureds and owned or leased the property in question, the owned-property
15 exclusion applies.

16 Finally, AMS argues that the owned-property exclusion would prevent coverage only for
17 property damage. This is a distinction without a difference because there is no allegation,
18 anywhere in any of the underlying complaints, of bodily injury. Moreover, the owned-property
19 exclusion specifically bars coverage for “costs or expenses incurred by you, or any other person,
20 organization or entity, for repair, replacement, enhancement, restoration or maintenance of such
21 property for any reason, *including prevention of injury to a person* or damage to another's
22 property.” *Id.* at 24. Thus, this exclusion precludes coverage based on the underlying claim that
23 AMS’s fraud created a risk of bodily injury.

1 **F. The Court should disregard AMS's references to the MBMH Fifth**
2 **Amended Complaint and other irrelevant evidence.**

3 In several places, AMS refers to the Fifth Amended Complaint filed in the MBMH
4 action. As explained in Scottsdale's opposition to AMS's motion for partial summary judgment,
5 this version of the complaint was never tendered to Scottsdale. C15-1004, Dkt. No. 71 at 2-3. A
6 complaint that was never tendered does not trigger an insurer's obligations. *Mut. of Enumclaw*
7 *Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 421, 191 P.3d 866 (2008). As such, the Court should
8 disregard these references, as well as AMS's references to motions filed in the underlying
9 litigation after the present lawsuit was filed. *Id.* at 3-4.

10 **III. CONCLUSION**

11 Because AMS has failed to show the existence of a covered claim, Scottsdale had no duty
12 to defend, and the Court should grant Scottsdale's motion for summary judgment.

13 DATED this 18th day of December, 2015.

14 OGDEN MURPHY WALLACE, P.L.L.C.

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CERTIFICATE OF SERVICE

I certify under the laws of the United States of America that on the 18th day of December 2015, I electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using the CM/ECF System and served counsel below by the method indicated:

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